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In the Supreme Court of the United States

OCTOBER TERM, 1958

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. App. A, B, D and E) are unreported. The opinion of the district court (R. 304a–319a) is reported at 168 F. Supp. 490.

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1958. A petition for rehearing was denied on January 27, 1959. The petition for a writ of certiorari was filed on February 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, as a matter of law, there was sufficient evidence of effect upon interstate commerce to support application of the Hobbs Act and whether that question was for the court or the jury.

2. Whether there was a prejudicial variance between the indictment and the issues submitted to the jury.

STATUTE INVOLVED

18 U.S.C. 1951 provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT

A. *The Extortion.* The petitioner, Nicholas A. Stirone, was convicted at a jury trial of extorting money from William A. Rider, in violation of 18

U.S.C. 1951, sometimes called the Hobbs Act (R. 302a). The petitioner was the president of Local 1058, affiliated with the Hod Carriers Union, and also president, since 1947, of the Laborers District Council of Western Pennsylvania with territorial jurisdiction over 33 counties of Pennsylvania (R. 41b–42b). Rider had a contract to supply Ragnar Benson Company with all ready-mixed concrete needed for the construction of a steel mill which Ragnar Benson was erecting for the Pittsburgh Steel Company (R. 45a). The evidence duced at the trial indicated that petitioner had extorted 50 cents a cubic yard for concrete which was supplied by William G. Rider under the contract to keep Rider "out of labor trouble" and "to hold on to the contract" (R. 105a, 137a). This amounted to $31,274.13 (R. 175a).

Petitioner claimed the money was a commission paid for aiding Rider in obtaining the contract (R. 184a-185a). He said the arrangement resulted from a conversation with Mr. Dierker (Rider's lessor and supplier) held August 27, 1951 at the Carlton House (R. 440a). Both petitioner and Mr. Dierker set the time and place as the Carlton House on August 27, 1951 (R. 45b, 47b, 54–55b). The government showed that the Carlton House did not open for business until the following year and that the Carlton House restaurant, where the conversation allegedly took place, was not opened until April 23, 1952 (R. 86b). The jury brought in a verdict of guilty (R. 302a) and petitioner was sentenced to three years imprisonment and fined $5,000 (R. 337a).

B. *Interstate Commerce.*

1. The indictment charged in part as follows (R. 6a):

> 1. That at all times hereinafter mentioned a part of the interstate commerce of the United States has consisted of the transportation between the several states of materials and supplies for use in the making of ready mixed concrete used in the construction and erection of a factory or plant for processing of steel.
>
> 2. That at all times hereinafter mentioned, William G. Rider was a party to a contract to supply ready mixed concrete for the erection of a steel processing plant at Allenport, Pennsylvania, and, for the purpose of performing said contract, caused supplies and materials to move in interstate commerce between various points in the United States and the site of his plant for the manufacture or mixing of ready mixed concrete, and more particularly, from the outside of the State of Pennsylvania into the State of Pennsylvania.

The evidence showed that the Rider Supply Company (which paid the extortion money) obtained all the sand used to make the ready mix concrete from the Duquesne Slag Company of Pennsylvania (R. 76a, 93a). The Slag Company in turn obtained more than 90% of its sand from the Duquesne Sand Company, which obtained the bulk of it from Ohio and West Virginia (R. 71a, 65a, 48a, 49a). During the period in question some barges of sand were consigned directly from the sand company to Rider (R. 79a–80a). In all, 32,764.13 yards of concrete were delivered in construction of the steel mill (R. 172a), from September 13, 1951 (R. 169a) to March 1954 (R. 172a).

2. In addition, George Herbert Keisling, the Assistant Controller of the Pittsburgh Steel Company, (R. 43a), testified that the major products from this particular hot strip mill were used in the automotive and appliance industry (R. 50a) and were shipped to Michigan and Kentucky (R. 53a). About 80% of the product of this hot strip mill were shipped interstate (R. 55a). The basic materials for the mill came from Minnesota and a small portion from South America (R. 53a).

3. During the course of the charge to the jury in regard to interstate commerce, the judge stated (R. 286a–288a):

> Since it is your exclusive function to decide what the facts are, it will be for you to determine the facts relating to the interstate commerce aspect of this case. It is only if there has been one of these effects on interstate commerce that an offense against the laws of the United States has been committed, because interstate commerce is the basis of the federal jurisdiction in this case.
>
> At the opening of the case, the Government introduced evidence relating to the dredging and shipment of sand which it contends was used in the manufacture of the cement which Mr. Rider used in performing the Ragnar-Benson contract which has been the subject of much testimony in this case.
>
> It is the Government's contention that all or substantially all of the sand so used has been shipped in interstate commerce. It is also the position of the Government that concrete supplied by Mr. Rider containing the sand shipped

in interstate commerce was being used in the construction of a plant which, when in operation, would produce articles of steel to be shipped in interstate commerce.

Consider the evidence of the Government on this question in the light of any other circumstances or other evidence bearing on the interstate nature of the shipment of sand or the sand used in making concrete supplied by Mr. Rider and on the use to which the mill under construction would be and was put. Then if you are satisfied beyond a reasonable doubt that the sand had been shipped from another state into Pennsylvania by any means of transportation and was used in making concrete supplied by Mr. Rider and that Mr. Stirone extorted money from Mr. Rider, the alleged extortion would be an act which obstructed, delayed or affected interstate commerce, and the movement of commodities in interstate commerce.

Or if you are satisfied beyond a reasonable doubt that Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce and if you also believe that the defendant extorted money from Mr. Rider, you are instructed as a matter of law that there has been a substantial effect on interstate commerce shown by the United States. In other words, if you find the facts to be as the Government contends, interstate commerce has been affected, obstructed and delayed.

Subsequent to the verdict, the district judge, in ruling on post trial motions, stated (R. 305a–307a):

> * * * It was then proved at the trial that sand used by Rider in manufacturing ready-

> mixed concrete and purchased from Duquesne Slag Products Company had without question been transported in interstate commerce, and secondly, that steel articles produced at the plant after construction had been transported in commerce to the centers of the appliance and automotive industries outside the State of Pennsylvania. * * *
>
> * * * The court correctly told the jury that if the government's facts were believed, interstate commerce had been affected by the conduct of the defendant * * *. That statement was based upon a premise that a deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs and affects interstate commerce as surely as though the same act had cut off the supply at its source.

4. On appeal, the conviction was affirmed, one judge dissenting. The majority found that the effect of the extortion on the movement of sand from outside Pennsylvania would be a sufficient involvement of interstate commerce. The dissenting judge did not disagree with that conclusion. The disagreement in the court below was only as to the problem created by the fact that the judge also submitted to the jury the issue of a possible effect on interstate commerce, not only from the sand purchases, but from the fact that Rider's concrete was used for constructing a mill which would manufacture articles of steel which would be shipped in interstate commerce. The dissenting judge was of the view that this was not an

adequate basis on which to find an effect on interstate commerce from the extortion and that, since it could not be determined whether the jury's verdict rested on the proper or improper basis, the conviction would have to be reversed (Pet. App. B). The majority opinion took the view that the alternative basis of interstate commerce jurisdiction was a proper one, and that the submission of this alternate basis to the jury did not constitute a prejudicial variance from the indictment (Pet. App. A).[1]

ARGUMENT

1. (a) As appears from the Statement, the trial judge found and submitted to the jury two possible bases on which the jury could have found interstate commerce: (1) the interstate commerce involved in bringing into Pennsylvania from Ohio and West Virginia the sand which went into Rider's ready mix concrete—an aspect of the case which may conveniently be designated as "sand commerce"; and (2) the interstate commerce resulting from the fact that the concrete was to be used in construction of a building for the manufacture of steel products which would be shipped in interstate commerce—an aspect of the case which we designate as "building commerce". None of the judges in the Court of Appeals expressed disagreement with the holding of the majority that the "sand commerce" was itself clearly sufficient to show that the extortion proved was a violation of the Hobbs Act. There is no warrant in the opinions for the

[1] On petition for rehearing *en banc*, Judge Biggs, agreeing with Judge Hastie in dissent, expressed the view that the variance was prejudicial (Pet. App. E).

petitioner's attempt to couple the ruling on this aspect of the case with the views expressed by the dissent as to "building commerce" so as to suggest that no federal offense was proved.[2] Clearly, the "sand commerce" was interstate commerce. *N.L.R.B.* v. *International Rice Milling Co., Inc.*, 341 U.S. 665; *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856. And equally clearly, the extortion proved did affect that "sand commerce" since, if Rider had not been able to keep his contract, the particular movements represented by bringing the sand from Ohio and West Virginia (whether directly to Rider, or to Rider via the Slag Company) would have been obstructed.

For this reason, we think that the issues raised by the dissenting opinions below, and argued by petitioner here, are not really presented in this case. The finding as to whether the relationship of these facts to interstate commerce was sufficient to support federal power was for the judge to make, and not the jury. The Hobbs Act punishes any person who "in any way" affects commerce by extortion. The question of whether there was extortion in relation to

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[2] The incomplete quotation from Judge Hastie's dissent relied on by the petitioners (Pet. 8) when read in context (Pet. App. B, p. 26) is clearly a reference to "building commerce" only. The sentence immediately following the petitioners' quotation reads: "But without some proof that the loss of this supplier would in fact have some delaying effect on the eventual productivity of the mill, any suggested ultimate effect even on interstate commerce several steps removed is speculative to an extreme degree." And later in his opinion (Pet. App. B, p. 27) he added "What has been said in this dissenting opinion concerns only one of the two bases upon which the jury could have found the essential effect upon interstate commerce under the court's charge."

Rider's contract was, of course, for the jury. But the issue of whether the impact on Rider's contract affected interstate commerce was a question of law for the court, and not an issue of fact to be submitted to the jury. There were no disputed issues of fact as to Rider's contract, the nature of the building, or the source of his supply. The only issue was the legal effect of such facts. That had to be determined by the judge. Early, under the Anti-Racketeering Act of 1934 (the predecessor of the Hobbs Act) Judge Learned Hand, in *United States* v. *Campagna*, 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867, stated at p. 527:

> * * * If these were the facts, the business was interstate as [a] matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue. * * *

See also to the same effect under the later Act, *Hulahan* v. *United States*, 214 F. 2d 441, 446 (C.A. 8), certiorari denied, 348 U.S. 856, which has been consistently approved. *United States* v. *Green*, 246 F. 2d 155 (C.A. 7), certiorari denied, 355 U.S. 871; *United States* v. *Lowe*, 234 F. 2d 919 (C.A. 3), certiorari denied, 352 U.S. 838; *United States* v. *Varlack*, 225 F. 2d 665 (C.A. 2).

If the decision was for the judge, any adequate interstate relationship is enough to support his conclusion, regardless of whether another basis is or is not correct. The "sand-commerce" alone supports the verdict. There is, as to the judge's ruling, no such

issue as that posed in Judge Hastie's dissent arising from the difficulty of trying to determine the basis of the verdict. We know that the judge found both aspects to involve interstate commerce. And since the "sand commerce" alone is sufficient, the "building commerce" question need not be reached.

(b) If the Court should feel that the "building commerce" question is in the case, then we submit that the majority below was correct on that issue. Contrary to the implications in Judge Hastie's dissent that the commerce aspect of the Hobbs Act should be construed restrictively, the statute shows on its face that it was the Congressional intent to cover the fullest reach of federal jurisdiction. The statute punishes anyone who "in any way or degree" obstructs or affects commerce, and defines "commerce", not only as movements between states, territories and possessions, but also as "all other commerce over which the United States has jurisdiction." In view of this sweeping language, extortion, which would affect construction of a steel mill which was obviously intended to engage in interstate commerce, is within the Act. See *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856, where one of the effects on interstate commerce was found to arise on the relation of the extortion there to the construction of a flour packaging and storage building. See also *Green* v. *United States*, 350 U.S. 415; and see, under the Fair Labor Standards Act, *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5). The operation of the concrete mixing business in the context of the case at bar is not com-

parable to petitioner's examples of a local retail grocery in *Fairway Foods, Inc.* v. *Fairway Markets, Inc., et al.*, 227 F. 2d 193 (C.A. 9), nor a local catering restaurant service in *Application of Bookbinder's Restaurant*, 240 F. 2d 365 (C.A. 3). The claim of conflict on the basis of such decisions is therefore without merit.[3]

2. The fact that the "building commerce" was not in terms spelled out in the indictment does not, as the dissenting judges below thought, show a material variance. The two bases of interstate commerce do not make out two charges. The gist of the offense is extortion which has an effect on commerce. If that commerce is interstate commerce, a case within federal jurisdiction is made out; if the commerce is not interstate there is no federal offense. The petitioner

[3] If, as Judge Hastie believed, the trial judge was wrong in his ruling on the "building commerce" issue, and if that issue should (contrary to our view) properly have gone to the jury, then there would be presented the situation mentioned by Judge Hastie of trying to determine whether the jury's verdict rested on a proper or improper basis and whether, in the light of that fact, the judgment could be affirmed. We do not think that question need be reached since we think both that the issue was for the judge alone, and that, in any event, the judge's ruling on the "building commerce" was correct. But, if it became necessary to do so, we would argue that, even on the assumption that the ruling was incorrect on the "building commerce" issue, the judgment below could properly be affirmed on the basis of the "sand commerce" evidence. As noted, the facts as to each of the aspects of interstate commerce were not in dispute. There is thus no reason to believe that the verdict rested alone on the "building commerce" aspect interstate, and not also on the "sand commerce" aspect. And since the "sand commerce" is enough to make out the federal offense, there is no reason why the judgment should not be affirmed on such ground.

is incorrect in arguing (Pet. 12) that the variance in this case was such as to deprive him of his protection against another prosecution for the same offense. The petitioner states that he was not protected "against another prosecution for the offense of having obstructed the sending out of the steel products into interstate commerce." But the offense defined by the statute is obstruction of commerce by extortion, and not obstruction of "sand commerce" or steel "production commerce" or any other particular kind of commerce. Hence, had the case been tried only on the "sand commerce" theory, and had the petitioner been acquitted, he could not thereafter have been tried on the "building commerce" theory; he would have stood acquitted of the whole offense of obstructing any aspect of interstate commerce by the extortion charged.

The only question as to variance, then, is whether it was such as to take the petitioner by surprise and deprive him of the right to make an adequate defense. This question disappears from the case if, as we have developed above, the entire issue of interstate commerce was for the judge. On that view, the whole issue as to "building commerce" becomes immaterial since the judge's finding on "sand commerce" is enough. But even if the issue was properly left to the jury, there was no prejudice to the petitioner. The indictment charged that the sand was for a steel mill and hence proof with respect to the mill was within the charge. There was no dispute as to the facts. The petitioner had ample time to consider the legal implications of those facts with relation to commerce. The

trial lasted from June 4 to June 19 (R. 3a). The fact that the government claimed effect on interstate commerce by reason of the "products at the plant that was constructed going out" was developed early in the trial (R. 51a), and all sides then understood that this raised a question of law for the court (R. 52a). At the close of trial, the petitioner's counsel requested an adjournment to enable him to counteract testimony of Mr. Doherty, offered by the government in rebuttal on the extortion issue (R. 218a–241a, 266a–267a), but significantly there was no such request at any time with respect to the interstate commerce issue.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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